STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. BOX 30212
LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

February 15, 2011

Mr. Corbin R. Davis
Clerk of the Michigan Supreme Court
Post Office Box 30052
Lansing, Michigan 48909

Re: ADM File No: 2010-05

Dear ~~Mr. Davis:~~ Corbin

I write to express my concerns regarding the proposed amendments to Rules 2.112 and 7.206 of the Michigan Court Rules (MCR) in ADM File 2010-05. The proposed changes remove the three provisions in MCR 2.112(M) that require allegations must be stated with particularity: (1) "the factual basis for the alleged violation or a defense must be stated with particularity"; (2) "the plaintiff must state with particularity the type and extent of the harm" (for alleged violations of art 9, § 29); and (3) "the plaintiff must state with particularity the activity or service involved" (for alleged violations that relate to the second sentence of art 9, § 29). Because MCR 7.206(D)(1)(a) and MCR 7.206(D)(2)(a) incorporate the standards from MCR 2.112(M), the proposed amendments also change the pleading requirements for filing a complaint or answer in an original action under MCR 7.206(D)(1)(a) and MCR 7.206(D)(2)(a).

Actions in Headlee cases focus either on the first sentence of Const 1963, art 9, § 29, the "Maintenance of Support" Clause, or on the second sentence, the "Prohibition on Unfunded Mandates" (POUM) Clause (also known as "new activities and services" that did not exist in 1978). The proposed amendment would eliminate the requirement that a plaintiff specify in detail the activity or service that is being challenged (either a first or second sentence case) and the type and extent of harm. For example, a plaintiff could claim that the alleged violation is related to curriculum requirements imposed on school districts. A plaintiff could simply attach a copy of the enrolled bill and satisfy the new rule without going into detail regarding the specifics of the increased cost or new activity on the school district. Therefore, the amendment would make it nearly impossible for the State to respond to a Headlee complaint. Further, it is critical that, at a minimum, the complaint delineate whether the plaintiff is alleging a violation of the first or second sentence because the proofs and defenses are very different.

Given the Michigan Supreme Court's most recent decision in *Adair v Michigan*, 486 Mich 468; 785 NW2d 119 (2010) (*Adair VI*), it is critical that the pleading requirements remain in the rule or alternatively, be expanded. In the recent *Adair VI* decision, the majority determined that in an action brought pursuant to the POUM clause the plaintiff must only establish a new or increased level of activity or service required by the State and no appropriation for the new or increased activity or service. The burden then shifts to the State to show that there were no necessary increased costs (or costs to the State if it were to perform the activity), or that the cost was *de minimus*. Thus, it is critical that plaintiffs plead with specificity the type of harm, the extent of harm, and the identity of the statutes, rules, or requirements at issue. In this way, defendants are better able to identify whether the activity or service is actually a State requirement, the extent of the activity and the State/local funding at the time the Headlee Amendment was enacted, the cost to the State to perform the activity, and the extent to which the cost of the activity is offset by grants, federal funds, etc.

I also oppose the proposed amendments to Rule 7.206(E)(3)(b). That amendment would allow the Court of Appeals panel to refer the suit to a special master – a practice that is currently utilized on occasion, but not specifically authorized in the current court rule. I am concerned with the proposed rule change for three reasons: (1) the rule will likely encourage the unnecessary use of special masters resulting in additional delay; (2) the rule does not address the qualifications and cost for special masters; and (3) if special masters are used, the rule may reduce the State's ability to obtain relief through dispositive motions.

Most Headlee Amendment cases are resolved without prolonged litigation and the need for a special master. *Durant I* and *Adair VI* are clearly the exception, not the norm. Thus, the proposed rule may actually delay proceedings by encouraging the Court of Appeals panels to routinely and prematurely refer the suit to a special master.

The rule also does not address the qualifications or expenses of the special master. Presumably the special master will have some knowledge and experience with Headlee fact finding and proper application of the law, rather than mere dispute resolution. The proposed rule does not address the special master's qualifications, the selection process, or the parties' role in that process. Moreover, the rule does not address the cost of the special master if the court refers the case.

Finally, the proposed rule impacts the State's ability to dismiss a suit by dispositive motion. The rule does not address the special master's authority to address dispositive motions, or the parties' ability to present dispositive motions to the Court of Appeals once the suit is referred to the special master. Action on a party's dispositive motion may be delayed until the special master builds a complete factual record and issues a written report for the court setting forth findings of fact and conclusions of law. As a consequence, the proposed rule may be inefficient and result in additional delay and expense.

On behalf of the State agencies that are required to defend against these complex Headlee actions, and which potentially can have enormous financial ramifications to the State's budget, I oppose the proposed amendments to MCR 2.112 (M), MCR 7.206(D)(1)(a), and MCR 7.206(D)(2)(a), as well as the special master provisions in 7.206(E)(3)(b). In addition, I recommend extending the time in which the State may file its answer to 60 days.

Thank you for the opportunity to comment on these proposed changes.

Sincerely,

Bill Schuette
Attorney General